4. There is a total absence in the present record of any factual or legal support for a proposition that the sole purpose of the warrant of arrest of the nurse was to search and seize the records of Doctor Elder.

Rather, the question presented is as in the proceedings below, viz., whether there was an unlawful search and seizure, and, if so, whether any of the material subject thereto either found its way into evidence or led to initiation of the instant proceedings.

To reiterate, these questions are resolved by the opinion of the District Court of Appeal, which opinion has carefully synthesized the facts of record.

PETITIONER'S STATEMENT OF THE CASE

Petitioner's statement of the case (appearing on pages 4, 5 and 6 of the petition) comprises either actual misstatements or grandiose advocacy in favor of his position, viz.:

1. Doctor Elder has not been licensed for a "period of 37 years," but rather received his license from the State of California in 1937. (RT 84:16-18.)

2. Whether the addicts in question were "former addicts" was the subject of numerous pages of testimony resolved by each trier of fact and the District Court of Appeal against Doctor Elder.

3. Whether Doctor Elder was motivated by a "manifestation of professional humanity incident to a studied program of care" was a question likewise resolved in all of the proceedings below against Doctor Elder.

4. It was not respondent which insisted "that former drug addicts surrender to the authorities for commitment t state institutions;" but rather the statutory mandate of the laws of California. (See *inter alia* Health and Safety Code §§ 11390-11396.)

5. It was not respondent which obtained a "warrant for the arrest of the nurse of the petitioner," but rather the arrest in question was accomplished by the combined efforts of the San Francisco Police Department, the California State Board of Pharmacy and the Board of Medical Examiners. (RT 120:5-18.)

6. There was not a confiscation of "all of his records relative to his practice," but rather only those records pertaining to the conduct of *both* the nurse and Doctor Elder with reference to the administration of drugs to narcotic addicts. (RT 120:19-26 to 121:1-12.)

7. Whether there was a refusal "to permit the nurse the use of a telephone for the purpose of telephoning counsel" is not only a statement completely without support in the record, but is a collateral factor which has not heretofore been injected at any stage of the instant proceedings.

8. The statement that "The evidence adduced at the administrative hearing was based upon the records illegally seized" is again not supported by the record as shown *inter alia* by the detailed analysis presented in the opinion by the District Court of Appeal.

9. Petitioner states "The trial Court determined that the obvious purpose of the arrest of the nurse was to search for and seize the doctor's records." In the first instance, if the trial court had so determined, it was beyond its power and function to do so since there was no support for such a proposition in the facts of record. In the second place, such a determination is not reflected in the findings of fact, conclusions of law or judgment of the trial court. In the third place, any determinations of the trial court are at this juncture of no moment since said court was reversed upon appeal.

10. The allegation that "the District Court of Appeal of the State of California tried the case de novo" is an absurdity.

11. Petitioner states: "Immediately upon the denial of the petition for a hearing a stay was granted permitting the submission of this case to the Supreme Court of the United States for decision relative to the granting of a writ of certiorari and such other and further proceedings as by this Honorable Court might be appropriate." Lest this statement lead to a misunderstanding that the California courts anticipated or sought some type of review by the Supreme Court of the United States, it should be pointed out that former counsel for Doctor Elder merely sought a stay of remittitur from the District Court of Appeal. Whether this stay of remittitur, which was granted as a comity to Doctor Elder, would or would not affect his right to petition to the United States Supreme Court is most doubtful.

12. Whether "All constitutional issues were raised in the proceedings below as are indicated in the record presented herewith" is a statement subject to some scrutiny. For example, in seeking favorable action by the California Supreme Court (as reflected in the Petition for a Hearing by the Supreme Court partially set forth in Appendix 4 to the Petition for Writ of Certiorari), Doctor Elder only obliquely alluded to the Fourteenth Amendment of the United States Constitution.

RESPONDENT'S STATEMENT OF THE CASE

As heretofore indicated, the opinion of the District Court of Appeal is quite precise in setting forth all of the operative facts of record; however, for purposes of shortening the instant brief respondent will attempt to further narrow the facts necessary to an understanding of any potential legal issues. The evidence necessary to support the three key paragraphs in the Board's decision (Appendix 1 of the

Petition for Writ of Certiorari) needed only to demonstrate:

1. that Doctor Elder did prescribe the drugs in question for the persons named, and

2. that a substantial number of said persons were at all times material a habitué or addict.

Proposition number 1 was totally taken without the realm of the doctrine of search and seizure by virtue of the stipulation set forth at page 30 of the transcript of the hearing held on June 18, 1963. Such stipulation indeed relieved the need to adduce any evidence with respect to proposition number 1, and hence the entire burden of proof resolved to proposition number 2.

Support of proposition number 2 was gained by evidence which is hereinafter cited from the record in the sequence in which it was adduced. Even before proceeding to Argument *infra*, it should be apparent that such evidence was totally out of phase with any claim of unlawful search and seizure.

As seen from the transcript of the hearing held June 18, 1963, Investigator Smith testified in substance that Alice Roussell, employed as a nurse by Doctor Elder, had stated that the doctor was prescribing Methedrine for alcoholism and addiction—and that Doctor Elder was treating people for drug addiction. (RT 120 and 121.)

At said hearing Inspector Rinken of the San Francisco Police Department Narcotic Bureau identified some of the fourteen named persons as addicts or habitués. Said witness further testified that the named persons had been habitually addicts. (RT 131, 132, 133 and 135.)

As seen from the transcript of the hearing held on June 19, 1963, Mr. Vanderford, Inspector for the Narcotic Bureau, San Francisco Police Department, testified at

pages 5 and 6 that three of the named persons showed positive reaction to the Naline Test, indicating them to be under the influence of narcotics. At pages 13 and 14, Inspector Vanderford testified that a list of Doctor Elder's patients *voluntarily* disclosed to him by petitioner had contained the names of at least 100 addicts then under treatment by Doctor Elder. This voluntary disclosure was long prior to institution of any proceedings against Dr. Elder or his nurse.

At said hearing, Agent Noel of the State Department of Justice, Bureau of Narcotic Enforcement, (RT 19 through 32) identified some eight of the named persons as narcotics addicts and/or Methedrine addicts.

Deputy Sheriff Price, at page 47, testified that Doctor Elder's nurse, Miss Roussell, had stated that one of the named individuals was a patient for whom Methedrine had been prescribed and that said named person was under treatment for addiction.

At pages 48 through 50, Mr. Dusheck, reporter for the *News-Call Bulletin,* testified that in an interview, Doctor Elder had rendered the admission that he was treating patients with Methedrine and that these patients were addicts and former addicts. Mr. Dusheck also gave the following testimony:

> "Q. Did Dr. Elder specify how many patients whom he would identify as addicts he has seen in the past three years?
>
> "A. No, he did not.
>
> "Q. Did he give any round numbers as to the number of patients he had seen?
>
> "A. Not in the course of this interview.
>
> "Q. Did you ascertain the amount or number of patients from some other source?
>
> "A. Dr. Elder himself at a public hearing before the Board of Pharmacy Examiners stated he had be-

tween 200 and 250 addicts and former addicts. At least, I so reported in the News-Call Bulletin." (RT 50:8-19.)

Detective Bernard, at page 57, testified to the following admission by Doctor Elder: that he was treating one of the named individuals for narcotics addiction and that he had prescribed Methedrine for such individual.

At pages 61 through 64, Agent Chasten of the Bureau of Narcotic Enforcement, State of California, identified some 21 of the named individuals as addicts, and an additional 13 as users.

Doctor Elder at the hearing held June 19, 1963, voluntarily chose to testify and during the course of said testimony gave evidence which further took this matter from without the claim of unlawful search and seizure. The fair inferences to be drawn from Doctor Elder's testimony to the effect that he was treating addicts are scattered throughout his testimony as such appears at pages 84 through 164.[1] Moreover, to demonstrate that Doctor Elder's testimony gave support to the decision of the board in such a manner as to foreclose claim of unlawful search and seizure, we draw attention to the following:

> "Q. And when the patients—at least some of the patients—who are on these Schedules, Appendices A, B and C, gave you the history, they still had a craving for narcotics. Is that correct?
>
> "A. All of them had a *craving*....
>
> "Q. Now, if one of the patients had had — Incidentally, may I ask if you are familiar with the word 'fix'?
>
> "A. Yes, sir.

---

1. Dr. Elder's testimony is liberally quoted in the opinion filed by the District Court of Appeal. However, for purposes of continuity and to show transcript references, the instant brief will also quote therefrom.

"Q. Would you tell us what that means?

"A. A fix is a shot of heroin, depending on the individual's requirements. Some addicts can get along pretty well on a ten or fifteen dollar a day habit, and some of them work it up to one hundred and fifty or two hundred dollars a day.

"Q. If a patient had had his *last fix on the day he visits your office,* would you say he was a former addict or an addict?

"A. Well, that depends on how—the *term* they use *—how strung out; how far they were taking.* In other words, if an addict had been away from his main habit, if he has a fifty-dollar-a-day habit and he had been away for several months but just happened to meet a friend who said, 'Come along, let's have a fix,' as you call it, 'We've got a party going.' They may take that one, and *I don't think that should disqualify them for my treatment.*" (RT 104:1-26. Emphasis added.)

"Q. As I understand it, Doctor, not all the histories concerning addiction had been limited to heroin. Is that correct?

"A. That is correct. Some of them have been on morphine. Some are on alcohol. Some are *addicted* to nembutal. They'll take eight or ten or twelve nembutal a day to keep themselves going." (RT 109:16-22. Emphasis added.)

"Q. Could you tell us, Doctor, what part of your decision to prescribe this drug in ampule form—what was the reason for that?

"A. Well, the reason for that is that during an *addict's* acquiring and maintaining his habit, he develops a ritualistic fetish for the needle. He becomes needle happy, or they call it 'behind the needle,' and they like the ritual of preparing whatever they're going to take, whether it's Methedrine or a narcotic or distilled water or some of them will just use a needle just to be using it. It's a type of fetish that they develop, and I'm sure it's more a psychological thing than physical, and I'm sure that the doses of Methedrine tablets

could solve their depression as well as the needle, but they prefer the needle, and I don't see what difference it makes how they take it." (RT 112:11-25. Emphasis added.)

"Q. What do you consider to be the range of therapeutic dose for Methedrine?

"A. Well, I think that the most effective dose is three ampules a day, the highest effective dose except in a few cases where their heroin addiction was tremendous, and then on four a day. I've had some patients tell me, who have been on a one-hundred-fifty to one-hundred-dollars-a-day habit, that any time a patient takes more than four ampules a day he's looking for extra kicks that he doesn't need, and I've had several of them tell me that. It's rather difficult to segregate this and correlate the information from these people because *I realize all of them are basically liars and cheats and thieves and everything else, and my only attempt all this time has been to try and correlate a series of stories,* and if they meet at a focal point, I must more or less assume that they're true. If I have ten or twelve different stories, then somebody or all of them are not sticking to the truth." (RT 128:13-26 to 129:1-3. Emphasis added.)

"Q. At what point does a Methedrine injection carry any risk of toxic reaction?

"A. That varies with the patients. I had some who would tell me that they can take up to eight a day without becoming paranoid or without becoming hyperactive.

"Q. This is according to their own subjective impression of how they're behaving?

"A. Yes, and I check it with the family or with somebody else as to how many they are taking a day. I try to talk to members of the family to watch them because *the tendency of the drug addict is to overdose in anything they take.* If they take aspirin, they'll take half a bottle. They're not content with ordinary doses

because their system seems to have developed an affinity for these things.

"....

"Q. And what is the longest period of time you've continued to treat them?

"A. About three years. *Some of them just can't get along without it. They can't work. They're depressed.* They'll stay home, lie around the house; they won't get up and around. They start to revert to their narcotic state, if you wish to call it that—or post-narcotic state. It drives them to seeking something to help them." (RT 129:25-26 to 131:1-12. Emphasis added.)

"Q. Were you aware that any of your patients might have been on parole when they came to your office or are under treatment?

"A. They were under treatment somewhere else.

"Q. *Might have been on parole?*

"A. *Yes.*

"Q. Were you aware of this?

"A. Yes, sir.

"....

"Q. On any of these people that might have been on *parole* to the law did you *inquire* regarding the results of their previous Nalline test?

"A. *Not specifically.*

"Q. You're aware of the fact that if they were on parole to the law they would have received Nalline tests?

"A. Yes. When they are on parole, the ones the officers testified to, I don't know how they pick them up, by surprise or not, but I did for a while ask them about this Nalline test, but they were all negative and these people just won't go for their Nalline test if they had anything before. And they're smart enough to know if they have some narcotics within—I think it's about 48 to 60 hours; I don't think they can tell 70—so they just won't go. They'll figure out some excuse and not show up.

"Q. You testified it was your policy to attempt to reduce the requirements of Methedrine on these patients now. How did you attempt to do this while you were out of the country? Did you give your nurse specific orders to *cut down* their requirements?

"A. *No.*" (RT 136:9-26 to 137:1-18. Emphasis added.)

The documentary evidence received as exhibits during the proceedings before the board was of such a nature to not only conclusively demonstrate support for proposition number 2 (*supra* at p. 7, *viz.*, that a substantial number of said persons were at all times material a habitué or addict), but also was totally divorced from any possible claim of unlawful search and seizure. Such evidence is found at the end of the transcripts of the hearings held June 18 and 19, 1963.

Exhibit No. 2, being transcript of Case No. 390, "In the Matter of the Accusation against Ansel B. Molfino," before the California State Board of Pharmacy, discloses Doctor Elder's sworn testimony and admissions as follows:[2]

"Q. And, Doctor, this group of patients reflected in those patients' record cards, was there any common factor as to what they were being treated for, or what medication?

"A. Yes, the common factor is 20 mg. ampules of methedrine in all of these I've noticed. I don't think there's anything else.

---

2. It should be understood that in the course of completely independent proceedings in which Dr. Elder was not a party brought against certain pharmacists and pharmacies before the California State Board of Pharmacy—which proceedings long antedated the institution of any action against Doctor Elder—Doctor Elder testified to various aspects of his prescribing practices in relation to Methedrine. Doctor Elder's testimony was pursuant to subpoena and under oath. A transcript of such independent proceedings was offered in evidence in the instant action. A very small portion of such testimony is quoted herewith.

"Q. And as to the cause or the reason for this prescription, was there any common factor?

"A. Yes, these are mostly either alcoholics or drug addicts, narcotics addicts." (RT, 6/18/63, Exh. 2, 16:13-22.)

Exhibits Nos. 6, 9 and 10 are as follows:[3]

Exhibit No. 6, commitment records of Harold Drake, indicate that prior to and co-existent with his treatment by Doctor Elder, said individual was committed for narcotic drug addiction or for habit-forming drug addiction on ten separate occasions. As part of said exhibit were various proceedings in the superior court bearing the signatures of numerous superior court judges judicially declaring this individual's addiction and/or habituation.

Exhibit No. 9, Certificate of Death of Roy Lavette, indicates that this named patient of Doctor Elder died from an overdose or poisoning by narcotics.

Exhibit No. 10, commitment record of Albert Ng, indicates that this named patient of petitioner had been adjudged a drug addict and was accordingly committed by the superior court. (Exhibits, RT, 6/19/63.)

ARGUMENT

INTRODUCTION

Respondent will meet in seriatim the various arguments set forth by petitioner, primarily in an attempt to demonstrate that petitioner's arguments and concomitant citations of authority are launched from false premises.

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3. These latter three exhibits constituted public records and, of course, likewise had no possible connection with any of Doctor Elder's records.

Petitioner argues (p. 6, et seq.):

"I

"The District Court of Appeal Erred in Holding That the Search and Seizure of the Confidential Records of Dr. Elder's Patients Was a Lawful 'Incident' of the Arrest of His Nurse"

"A. A Search and Seizure Is Unreasonable Where the Arrest Upon Which It is Based is a Mere Pretext for Searching the Premises."

Petitioners support for this argument contains three flagrant fatal flaws, viz.:

1. A mere expression of opinion by an inferior court is of no legal moment unless reflected in the findings of fact, conclusions of law and judgment, which in the instant case do not reflect Judge Karesh's gratuitous statement.

2. Of even less legal significance is a gratuitous opinion of an inferior court when such is not based on any fact of record or clearly cognizable inference. To reiterate, there is no support in the instant record for any proposition that the purpose of the arrest of Doctor Elder's nurse was to gain access to petitioner's records.

3. Any formalized decision of the Superior Court (by way of findings of fact, conclusions of law or judgment) are rendered a legal nullity by the reversal thereof by a higher court such as the District Court of Appeal herein; and the further denial of a petition for a hearing by the California Supreme Court. A more futile nullity is represented by the mere statements of the former court during the course of argument presented before it. From these mere statements (set forth on page 6 of the Petition for Writ of Certiorari) flow the remainder of petitioner's arguments.

Conversely we have the *actual holding* of the District Court of Appeal herein by virtue of the following statement (Petition for Writ of Certiorari, Appendix 3, page 34):

"On the record, therefore, there is nothing to sustain any implication from the trial court's finding that the filing of the complaint and the issuance and execution of a warrant against the nurse was other than bona fide. The arrest being valid the search attendant thereto was lawful."

The foregoing should set at rest any doubts created by the petitioner's unfounded allegations of "pretext." When such allegations are realized to be unfounded, there appears no need to discuss the cases set forth by petitioner at pages 6, 7, 8, 9, 10, 11 and 12, all of which are based upon the rationale that a search and seizure cannot stand where the arrest upon which it is based is a mere pretext.

Petitioner argues (p. 12):

"B. The Search and Seizure of Dr. Elder's Records Was Not Reasonably Related to the Arrest of His Employee."

Petitioner's argument and authority under the above subheading appear to originate from his view that whatever the nurse was doing at the time of her arrest was not illegal.

At this late juncture and in a collateral attack the legality of the nurse's activities appear irrelevant. Because of the remoteness of this question we will rely primarily upon the opinion of the District Court of Appeal which covers this subject and concludes that the nurse's activities were of questionable legality (Petition for Writ of Certiorari, Appendix 3, pages 33-34).

Rather, the important thing is that a valid warrant was issued for the arrest of the nurse. Pursuant to her lawful arrest and incidental thereto certain records were lawfully seized. As was succinctly stated in *Draper v. United States*, 358 US 307, 3 L ed 2d 327, 79 S Ct 329 (1959), at page 332:

"The arrest was therefore lawful, and the subsequent search and seizure, having been made incident to that lawful arrest, were likewise valid." It should be remembered that in the case last cited the arrest was lawful even though made *without* a warrant—there being no question herein but that the arrest was *with* a warrant.

Insofar as petitioner has also sought under this subheading to raise some question as to the "agency argument" we believe it sufficient to merely remind this Honorable Court that under the facts of the instant matter the nurse was in effect the alter ego of the doctor at the time of her arrest. For example, from the transcript of hearing dated June 18, 1963 Miss Roussell testified: She was the doctor's employee. (RT 2.) She kept the records in question. (RT 3.) It was she who separated the records into a category for Methedrine patients as distinct from regular patients. (RT 3 and 35.) It was she who made the entries on the records. (RT 3.) Miss Roussell maintained the office during the doctor's absence in South America. (RT 40-41.) *During said period of time immediately preceding her arrest, she collected fees for the doctor.* (RT 57 and 86.) She referred to the charts and used the charts for reference and other purposes. (RT 47; 48, 53, 74.) Everything she did was pursuant to the doctor's instructions. (RT 62.) On occasion she would take patients' histories. (RT 67.) It was she who okayed the refills. (RT 68.) She placed entries concerning charges *for the doctor's fee* on the chart. (RT 88.) During the doctor's absence, she gave prescriptions for Methedrine ampules. (RT 119.)

Petitioner argues (Petition for Writ of Certiorari, p. 15):

> "C. The Search and Seizure of All of the Petitioner's Files and Confidential Records Constituted a General, Exploratory Search Which is Condemned by the Fourth Amendment."

The falsity of this argument and the total inapplicability of all cases cited under said argument is immediately apparent from petitioner's major premise that "all of petitioner's files were searched and seized." Indeed, on page 16 of the Petition for Writ of Certiorari, petitioner, in support of this allegation cites from "RT 2:25-3:5." A reading of such reference indicates that it comprises the mere unverified, unfounded argument of counsel when the Board's decision was on mandate to the Superior Court.

By reference to the facts of record we see from the testimony of Doctor Elder's nurse the following:

"Q. You testified that you separated the Methedrine records from the other records?

"A. Yes, sir.

"Q. Why was this?

"A. For my convenience in filing them, because as far as phone calls from patients and so forth and billing them, I do not send them out a bill every month. They usually either pay cash or I give them a statement before they leave the office to send their remittance in and for just convenience to myself. That's all." (RT, 6/18/63, 73:13-22.)

"Q. And I understand in some of them there were Methedrine patients and for some reason you identified these in some method you had, and there were a group of other prescriptions also?

"A. Yes, some of his regular patients. And I call them regular patients, but that's the way I differentiate them as far as my filing." (RT, 6/18/63, 79:5-11.)

"HEARING OFFICER: Miss Roussell, these two stacks are those you pulled, all the Methedrine refills? Is that what the subpoena called for, or what?

"A. All the charts that were subpoenaed were patients who were prescribed Methedrine by Dr. Elder.

"HEARING OFFICER: I've never seen them, neither the Board nor myself.

"A. That doesn't mean all of his patients or anything; that's just the ones that were subpoenaed. That's the ones I brought." (RT, 6/18/63, 82:11-20.)

"By Dr. Wallerius:

"Q. You spoke a while ago about 'regular patients.' How do you differentiate 'regular patients' from other patients?

"A. How do I?

"Q. When you classified them as regular patients.

"A. When I put them in the two files.

"Q. Why do you put one card for one file and one card for another?

"A. Certainly, if a woman is pregnant, she is in the O.B. file; if a patient is in the hospital, that goes into another file.

"Q. But what is a regular patient?

"A. At the time I was speaking about everyone else excepting the ones that Doctor prescribed Methedrine for.

"A. So regular patients are those that do not get Methedrine?

"A. That's what I was stating." (RT, 6/18/63, 87:7-24.)

Supplementing the testimony of Miss Roussell was the following by Mr. Smith:

"A. Yes, we went to the office with a warrant for the arrest of Miss Roussell and at the time she was placed under arrest she was asked where the records were of the patients who had received authorization for Methedrine during the period of the doctor's absence. She indicated some which were loose on top of a desk adjoining hers, said that was a part of them and that the others were in a metal filing cabinet on a shelf lower down.

"Q. And did you question Miss Roussell as to what Dr. Elder was treating this category of patients for?

"A. Yes, she was asked for what reason the doctor was prescribing Methedrine to all these people, refer-

> ring to the file drawer with the patients' record cards in them. She stated for alcoholism and addiction. And in another question a few seconds later, the matter—I brought up the matter again and asked her if it was true that Dr. Elder was treating these people for drug addiction, and she said yes; alcoholism and drug addiction [sic]. (RT, 6/18/63, 120:21-26 to 121:1-12.)

The District Court of Appeal recognized the plain fact that not all of Doctor Elder's records were seized as is reflected in their opinion. (Appendix 3 to the Petition for Writ of Certiorari, pp. 21, 32, 33 and 35.)

By recapitulation then the record demonstrates that not all of Doctor Elder's patients' records were seized, but rather only those which were designated by his nurse as pertaining to Methedrine patients. The record will further show (in toto) that said Methedrine patients as distinguished from Doctor Elder's "regular" patients were the addict trade. None of the records of the "regular" patients were searched and seized.

Under his argument subheading C petitioner constantly refers to a taking of all records. The cases cited by petitioner applied to situations where all records were seized. Such citations are valueless when it is realized that in the instant matter any records actually seized were those previously segregated by the nurse and designated by her upon her arrest as pertaining to Methedrine users.

Petitioner argues: (p. 19)

> "D. . Assuming But Not Admitting That State Officials Had a Right to Search Dr. Elder's Files as an Incident to the Arrest of His Nurse, the Subsequent Seizure of All of His Records Was Unlawful."

Again, petitioner persists in misstatements concerning the taking of "every single file in the doctor's office" and

"mass seizure," etc. Petitioner's constant allegations in this respect without one citation to the record can only be concluded as a conscious attempt to mislead. Again, any cited cases premised upon facts wherein all records were the subject of search and seizure can be of no moment herein.

Petitioner argues: (p. 22)

"II

"The District Court of Appeal Erred in Holding That Petitioner Failed to Show That the Evidence Admitted Was the 'Fruit' of the Documents Which Had Been Seized"

This argument is once again launched from an unwarranted reliance on certain "observations" of a court inferior to the District Court of Appeal. Petitioner's allusion to the sayings of the trial court are irrelevant because such sayings were not reflected in findings of fact, conclusions of law and judgment. More importantly the reversal by the District Court of Appeal extinguished anything generated by the lower court.

Petitioner argues: (p. 23)

> "A. Petitioner, Having Shown an Illegal Search and Seizure, Did Not Have the Burden of Showing That the Names of the Patients Listed in the Accusation Were the Fruits of the Poisonous Tree."

On page 24 of the Petition for Writ of Certiorari the following appears:

> "On the other hand, the names appearing in petitioner's records seized by the police, and the names appearing in the accusation against petitioner (which names were the basis for the testimony of respondent's witnesses) were *exactly the same.* It is clear that this evidence was not the 'fruit' of the search but the poisonous tree itself."

Respondent is at a loss to find one support in the present record for the above assertion.

It should be recognized that in California all prescriptions must bear the names of the patient for whom the medication is prescribed. (Business & Professions Code §§ 4227 and 4036; Health & Safety Code § 11166.)

Therefore, all prescriptions issued by Doctor Elder contained the names of his patients.

Moreover the prescriptions for his "Methedrine patients" also contained the particular drug prescribed, viz., Methedrine. (See code citations above.)

These prescriptions were required to be retained by the pharmacist to whom the individual addict would go. (See Business and Professions Code § 4232 and Health and Safety Code § 11175.)

A subpoena duces tecum was directed to *various pharmacists* located in the areas frequented by Doctor Elder's "Methedrine patients" directing that they bring in the prescriptions in question. In lieu of the pharmacist responding to the subpoena duces tecum a stipulation was entered. (RT, 6/18/63, 30:8-25.)

> "MR. DULLEA: It is hereby stipulated by and between the parties hereto that if the pharmacists responded to the subpoenas duces tecum issued by the Board of Medical Examiners, that their records would show that Dr. Elder prescribed and they dispensed Methedrine ampules for the persons listed in—Is that Exhibit or Schedule A?
>
> "MR. CARRERAS: Schedule.
>
> "MR. DULLEA: —Schedule A in the accusation and for the persons listed in Exhibit B—Schedule B. It is further stipulated that if the pharmacists responded to said subpoenas that their records would show that Dr. Elder prescribed and the pharmacists dispensed Percodan and Empirin Compound with codeine for the persons listed in Schedule C. Nothing in this stipulation shall be construed as admitting the truth of the

charging allegations of the accusation, nor shall it be construed as a waiver of the physician-patient relationship. Is that agreeable, Mr. Carreras?

"MR. CARRERAS: Yes, sir. (RT, 6/18/63, 30:8-25.)

In view of the foregoing it is difficult to understand the purpose of cases cited by petitioner under this subheading A.

Further difficulty in understanding petitioner's purpose is generated by the following misstatement on page 26:

"Since the State failed to show that the information was obtained independent of the illegal search and seizure (as conceded by the Attorney General), it must be concluded that the evidence herein was tainted with illegality, as indeed was held by the trial judge."

The initial portion of such statement contains two gross misconceptions: (1) that there was an illegal search and seizure, and (2) that the Attorney General conceded such.

Petitioner argues: (p. 26)

"B. Petitioner's Objection to the Introduction of Evidence Was Timely."

Whether petitioner's objections were either timely or proper speaks for itself by reference to the transcripts.

For example, in the first 102 pages of the transcript of hearing held June 18, 1963, counsel for Doctor Elder objected some 23 times to the introduction in evidence of any of the doctor's records and similarly objected to receipt of any testimonial evidence based even remotely upon matters which might appear in such records. These manifold and manifest objections were clearly stated to be *solely* upon the *privilege* set forth in Code of Civil Procedure section 1881. Said objections *were successful* as demonstrated by a reading of the first hundred some odd pages of the transcript and were augmented by instructions given by Dr.

Elder's counsel to an independent witness who refused to answer questions *which had been ruled proper* by the hearing officer.

The first injection of any claim of search and seizure problems arose on page 122 of the transcript of said hearing while Investigator Smith was testifying, and evolved the following:

> "HEARING OFFICER: All right. The objection is overruled. The next question was relating to looking through the records.
>
> "A. Yes, I recall the question. Did I subsequently have occasion to go through the records? The following day and for some time on a couple of occasions during the following week, I had occasion to go through the cards that were contained in that metal filing cabinet.
>
> "Q. And—
>
> "MR. EHRLICH: Is there a search warrant in this?
>
> "HEARING OFFICER: You can bring that out, Mr. Ehrlich. Go ahead, Mr. Carreras.
>
> "MR. EHRLICH: Well, I'm going *to move it all be stricken* unless this man had a search warrant." (RT, 6/18/63, 122:1-13. Emphasis added.)

Patently the objection was neither timely, in view of that which had transpired during the course of the hearing *up to such time*, and it was not proper insofar as it only related to the striking of Investigator Smith's testimony.

The next belated oblique reference to search and seizure is found in the transcript of the hearing held on June 19, 1963, at page 79, where *at the conclusion* of the board's case the following transpired:

> "HEARING OFFICER: All right, Mr. Ehrlich, you may proceed.
>
> "MR. EHRLICH: One, I want to address myself to a general motion for dismissal. I'll call Your Honor's

attention to the fact that Your Honor, over my objections, admitted certain things in evidence, regardless of the question of search and seizure. Your Honor referred to the Cooley case, the undertaking case." (RT, 6/19/63, 79:24-80:4.)

"MR. EHRLICH: Well, now, now—Your Honor has ruled that my motion to *strike the testimony of Mr. Smith on unlawful search and seizure—you denied that.*

"HEARING OFFICER: That's right, sir.

"MR. EHRLICH: And denied it in each instance where I made the motion. I don't have the transcript, so I don't have them all.

"HEARING OFFICER: That's right, for the record.

"MR. EHRLICH: And I might say—Well, Your Honor and Gentlemen, put Dr. Elder on without going into other matters, so that we can get through today.

"HEARING OFFICER: All right, Doctor.

"MR. EHRLICH: Doctor, will you please be sworn?" (RT, 6/19/63, 83:15-27. Emphasis added.)

Not only does the purported objection fall short of the standards enunciated by case law, but as will be developed *infra* appears ludicrous, in view of the fact that any imagined objects of an unlawful search and seizure were *excluded* from evidence on the basis of the doctor-patient privilege set forth in Code of Civil Procedure section 1881.

In view of the foregoing it is difficult to comprehend the following in the Petition for Writ of Certiorari on page 27:

"The District Court of Appeal also refers to the fact that petitioner stipulated that the pharmacists would testify to the prescriptions given those named in the accusation, without reserving his objection [241 A.C.A. at 367, 50 Cal. Rptr. at 321]. As heretofore discussed, the objection had already been made by counsel and was overruled by the hearing officer. (There is, moreover, nothing in the stipulation to show that the patients were addicted at the time the prescriptions were sold.)"

As heretofore noted the stipulation in question appears on page 27, et seq., of the transcript of June 18, 1963. Even being most generous one can not envisage any objections remotely connected to the Doctrine of Unlawful Search and Seizure until page 122 of said transcript of the hearing held June 18, 1963.[4]

Petitioner argues: (p. 27)

> "C. The State Failed to Show That it Obtained the Evidence Against Petitioner From an Independent Source."

Petitioner engages in an assumption when he states at page 28: "The District Court of Appeal assumed that information concerning the methedrine users was available from the prescription records of the pharmacists."

We respectfully direct this Honorable Court's attention back to the stipulation in question to the effect that the pharmacists' records *did in fact show* prescriptions for the drugs in question for the individuals in question.

Petitioner argues: (p. 28)

> "III
>
> **"The District Court of Appeal Erred in Holding That Erroneous Admission of the Evidence Obtained by Unlawful Search and Seizure Did Not Require a Reversal"**

Again, this argument of petitioner is predicated upon the legally meaningless expressions of the Superior Court. Perhaps petitioner's unwarranted reliance on said Superior Court is understandable since therein was the only stage of the proceedings where he has been successful. However, compounding such unwarranted reliance is the following statement on page 29 of the Petition for Writ of Certiorari:

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4. The District Court of Appeal recognized that petitioner completely failed to properly object on the "Fruit of the Poisonous Tree" Doctrine and that his other purported general objection was not timely. (Petition for Writ of Certiorari, Appendix 3, pp. 44-45.)

"The appellate court, however, reversed the trial court on the ground that the testimony of Dr. Elder compelled a finding that petitioner, as a matter of law, had prescribed methedrine to narcotic addicts. The appellate court concluded that in view of the foregoing, the State's evidence was not prejudicial—even though improperly admitted—and that the Board's findings must be sustained. The holding of the District Court of Appeal on this aspect of the case is erroneous for three basic reasons."

Needless to say the opinion of the District Court of Appeal, which covers numerous points and pages cannot be reduced to the proposition stated above.

However, from this false precis petitioner tries to reargue the facts of record and create a house of cards upon a foundation of the Fifth Amendment. *(infra)*

Petitioner argues: (p. 29)

"A. The Testimony of Petitioner at the Termination of the Administrative Hearing Was Compelled by the Erroneous Holding of the Hearing Officer that the Exclusionary Rule Is Inapplicable to Administrative Proceedings."

Under this subdivision petitioner isolates the self-serving, counsel-led statement of Doctor Elder that he never knowingly or intentionally treated a narcotic addict (Petition for Writ of Certiorari, page 29). Needless to say the whole voluminous record mitigates against this stand by Doctor Elder.

More importantly however, the petitioner then commences an involved discussion of his constitutional rights under the Fifth and Sixth Amendments. The futility of such arguments flows from the following:

1. Said arguments were never raised until the instant petition for writ of certiorari. (See for example Petition for Writ of Certiorari, Appendix 4.)

2. No amount of argument will mitigate against the plain and simple fact that Doctor Elder took the stand voluntarily.

3. Even prior to the time he voluntarily took the stand, Doctor Elder had volitionally bragged in the public press about the subject matter of the instant proceedings. (RT, 6/19/63, 48:16-26 to 51:1-26.)

4. Again, prior to the recent proceeding Doctor Elder, pursuant to subpoena and under oath, had testified to the same general subject matter in independent proceedings before the California State Board of Pharmacy.

5. Doctor Elder admitted that prior to the recent proceedings he had voluntarily disclosed the names of patients to the San Francisco Police Department, viz. (RT, 6/19/63, 96:10-26 to 97:1-22):

> "Q. Let me ask you this. On several occasions—at least one or more occasions you telephoned to the San Francisco Police Department and asked them to come to your office. That right?
>
> "A. Yes.
>
> "Q. And did they come to your office?
>
> "A. Yes, sir.
>
> "Q. And on how many occasions would you say?
>
> "A. Two occasions.
>
> "Q. On two occasions. Now, what was your reason for calling the San Francisco Police Department?
>
> "A. Well, I—After I started seeing these people—you get one; you get another; and you get two; and you get four; it goes by geometric progression, and pretty soon the word is out you're dispensing Methedrine or will try and help these people out. Whatever the word gets out, they come into the office and it didn't take me very long to realize that I was dealing with the type of people I'm dealing with. They are robbers, thieves, burglars, prostitutes, panderers, pushers. Every type of crime you can think of has

been committed by these people, and I thought in order to protect the people that I could help and protect myself, I should have some advice from the narcotics squad to find out how many of these people were violating the law and violating my confidence by going to other doctors, by buying it off the street in large quantities and how many of my patients were giving me a story and then going out and selling it themselves.

"Q. And the officers from the narcotics squad and I presume the state narcotics agents came to your office and went over a list of names which you propounded to them. Is that right?

"A. Yes, sir.

"Q. And they gave you certain information concerning some of the people on those lists?

"A. Yes, sir.

"Q. And they gave you information concerning some of the people on Schdules [sic] A and B and C? At least on some of these. Is that right?

"A. Yes, sir.

6. Doctor Elder's nurse, Miss Roussell, confirmed that she had prepared a list of Doctor Elder's Methedrine patients for prior presentation to the San Francisco Police Department. (RT, 6/18/63, 88:25-26 to 89:1-12.)

7. Inspector Rinken of the San Francisco Police Department testified to this previous voluntary disclosure of names by Doctor Elder as is reflected in the transcript. (RT, 6/19/63, 10:1-17 to 11:1-11.) A portion of his testimony follows:

"A. I don't. They're addicts as far as I'm concerned.

"Q. Under your impression?

"A. Under my impression.

"Q. There were a number of men that were on this list that were, according to the Narcotics Division, classified as addicts?

"A. Correct.

"Q. And were there a considerable number of these people?

"A. I don't know the exact number, but I would say it was in the neighborhood of at least a hundred names on the list.

"Q. That you would think could be classified as addicts?

"A. In my actual opinion anybody who has been an addict is an addict.

"Q. I understand the difficulty of defining it. Did this information—Was this information discussed with Dr. Elder?

"A. I don't believe it was.

"Q. You don't have anything to do with the practice of medicine, I'm sure.

"A. None whatsoever.

"Q. But you are, I suppose, aware of the treatment of addicts outside of an institution for addicts is improper?

"A. Yes, sir." (RT, 14:3-24.)

Petitioner argues (p. 33):

"B. The Erroneous Admission of Evidence Obtained by an Illegal Search and Seizure Should Not be Subject to the Normal Rules of 'Harmless Error.'"

This argument like the entirety of petitioner's efforts throughout fails to specify what evidence was actually introduced and admitted into evidence as a result of any search and seizure.

Petitioner talks about the exclusionary rule and cites cases pertaining to such rule on pages 33 through 37. But precisely what evidence in the present record was subject to being excluded by said rule?

Contrarily, it is beyond argument that Doctor Elder's records *were excluded from evidence* before the board upon his counsel's objection—predicated upon a doctrine

solely applicable to *civil proceedings*—that they were privileged on the basis of Code of Civil Procedure section 1881. That Dr. Elder's objections were successful *in excluding* the records sought by subpoena duces tecum *solely* by virtue of the alleged privilege is apparent from a reading of the first twenty-six pages of the transcript of hearing held June 18, 1963. (See also RT 31 through 35, 36, 49, 63, 68, 78 and 96.) As a matter of further anomaly, Dr. Elder's counsel twice instructed witness Roussell (purportedly an independent witness called by the board) not to answer questions, and in so doing clearly invoked the doctrine of *privilege*. (RT, 6/18/63, 37 and 102.) Indeed, witness Roussell on her own initiative claimed privilege! (RT, 84.)

Counsel for the doctor *did successfully exclude* the doctor's records from evidence and did successfully manipulate the witness Roussell in this respect.

Quite properly the District Court of Appeal recognized that the documents seized at the time of the arrest of the nurse were not received in evidence at the hearing. (Appendix 3 of the Petition for Writ of Certiorari, pp. 37-39.)

Petitioner argues: (p. 37)

> "C. The Testimony of Dr. Elder Does Not Show that His Patients Were 'Addicted' to Narcotics at the Time of Treatment."

Again, at this late juncture before the United States Supreme Court petitioner attempts to reargue and restate the facts of record. Needless to say, this Honorable Court does not appear to be the proper forum for arguing the facts.

Of more concern, however, is the attempt of the petitioner to present only those facts favorable to his contention.

Suffice it to say that Doctor Elder's denial of guilt under leading questions by his counsel was not only vitiated by his latter testimony under cross examination, but was overwhelmed by the other evidence of record.

The factual argument raised in this subheading was not raised before. That is, it was not until the instant petition for writ of certiorari that Doctor Elder sought to quibble with definitions of "addict," etc.

Prescinding for a moment from the legal considerations of the instant matter and mitigating against any mirable dictu pronouncements on the definition of "addict," we think that counsel for Doctor Elder made a very significant concession during the proceedings in the Supeior Court.

From Reporter's Transcript in the Superior Court (67: 25-26 to 68:1-5):

> "THE COURT: I don't want you to believe that I think, Mr. Ehrlich, if this evidence was legally in, that they wouldn't have had a right to revoke that license.
>
> "MR. EHRLICH: I agree with you.
>
> "THE COURT: Because on the basis of this evidence illegally seized, it shows a course of conduct that well merited the taking-away of the license, but I am concerned—"

Why the present argument on evidentiary matters in view of the above?

Petitioner argues: (p. 41)

"IV

"Applicability of the Exclusionary Rule to Administrative Proceedings"

Whether the District Court of Appeal did or did not assume without deciding that the exclusionary rule applied to administrative hearings is totally moot as to this particular petitioner for writ of certiorari.

That is, it is apparent from reading the lengthy opinion of the District Court of Appeal that said court's entire approach herein was in light of a presumed applicability of the Doctrine of Unlawful Search and Seizure.

Any possible benefit which would flow to petitioner under a presumption of the applicability of the exclusionary rule was indulged. Any possible consideration which could be given Doctor Elder under the Doctrine of Unlawful Search and Seizure was extended by the District Court of Appeal.

Therefore, we fail to understand petitioner's concern as to whether the District Court of Appeal used words acceptable to him in applying the Doctrine of Unlawful Search and Seizure to these proceedings. That is, in view of the posture of the facts of record and the evidence actually introduced the doctrine can be of no avail to this petitioner.

Stated otherwise, the District Court of Appeal, in reviewing the instant matter, predicated its review upon the hypothesis that the Doctrine of Unlawful Search and Seizure did apply to these proceedings. The applicability of said doctrine was urged before said court by Doctor Elder and said urging was accepted by said District Court of Appeal. How Doctor Elder could be damaged thereby is incomprehensible.

CONCLUSION

As heretofore shown, uncontroverted evidence in support of the Respondent board's decision was adduced by testimony of witnesses and by documentary evidence in the nature of transcripts, court orders, commitment records, etc., independent of Dr. Elder's records. The need for production of further evidence in the nature of prescriptions *not* under the doctor's control *nor* in his custody was eliminated by virtue of stipulation.

The background of said stipulation was that certain pharmacists and their records were under *subpoena duces tecum* (RT, 6/18/63, 30:8-25) to the end of establishing that Doctor Elder had prescribed Methedrine ampules for the named individuals in question. Quite obviously, the pharmacists' records, to wit, prescriptions rendered by Doctor Elder, would have proven the fact of precribing (under Business and Professions Code section 2391). That these prescriptions would have constituted evidence completely independent of and divorced from any of Doctor Elder's records is equally obvious. Hence, the stipulation which is, of course, evidence and which evidence is beyond any claim of illegal search.

Therefore, the records (the subject of alleged illegal search and seizure) of Doctor Elder and/or nurse Roussell were of no evidentiary moment to the board's decision. Indeed they were *excluded* from evidence on the basis of Code of Civil Procedure section 1881.

The doctrine of unlawful search and seizure is further obviated in the instant matter by virtue of the fact that the doctor's records were *sought* to be produced by means of a *subpoena duces tecum* (RT, 6/18/63, 1:26-2:2; 3:15-21; 81:7-26). No case can be found, and indeed logic denies the existence of authority applying the doctrine of illegal search and seizure to records which are sought under legal process of this nature.

In addition to the foregoing and in conclusion certain practical considerations are in order:

1. It is beyond argument that the within matter is not a criminal case nor even a quasi-criminal proceeding, nor governed by criminal rules (*West Coast, etc. v. Contractors State Licensing Bd.*, 72 Cal. App. 2d 287, 301, 302, 303).

2. The rather clear doctrine of consent vitiates any claim to unlawful search and seizure. Consent may be im-

plied, and consent is implied under the licensing laws when a person seeking to be licensed by the sovereign in turn agrees to certain conditions, *e.g.*, availability of records for inspection. This thesis is best synthesized in the case entitled *Paladini v. Superior Court,* 178 Cal. 369, at page 373:

> "It is also claimed that the order to produce petitioners' books violates the constitutional provision prohibiting unreasonable searches and seizures. . . . By engaging in the fish business and applying for a license therefor petitioners, in effect, consented to the inspection of their books as in the law provided. To require the production of such books is not a violation of the constitutional provision in question. . . . The purpose of such procedure is to enable the defendant, Weinstock, as state market director, representing the people of the state of California, to ascertain the conditions under which fish are being sold, not only for the purpose of determining whether or not there have been violations of his orders fixing the price of fish, but also to ascertain what prices should be fixed.
>
> "As already stated, the petitioners, by engaging in the business of dealing in fish caught in the waters of the state, in effect consented to the inspection of their books by the state market director, as in the law provided. . . ."

It should readily appear that the state's concern over the flow of narcotics and other dangerous drugs should be of equal concern to the state as is the price of fish.

3. The consent doctrine is *more than implied* with reference to records reflecting disposition of dangerous drugs *and/or* narcotics. It should be borne in mind that the respondent board's findings concern violations by Doctor Elder in *both* these areas. The State Narcotic Act (Health and Safety Code section 11000, et seq.) and the Dangerous Drug Act (Business and Professions Code section 4210, et seq.) clearly make the keeping of records mandatory and

even more clearly make said records available to inspection by authorized officers of the law. This being so, how can a person licensed by the state, directed by statute to comply—complain concerning the search of his records already declared by the Legislature *to be open to inspection?*

Wherefore it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated: San Francisco, California, December 6, 1966.

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